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LLM-INTERNATIONAL TRADE LAW

**TRADE LIBERALISATION VS PUBLIC MORALITY: CAN THE EUROPEAN UNION
SEAL BAN BE JUSTIFIED UNDER THE GATT**

ARTICLE XX (a)?

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Research dissertation presented for the approval of senate in fulfilment of the requirements for the LLM in International Trade Law in approved courses and minor dissertation. The other part of the requirement for this qualification was completion of a programme of courses.

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DEDICATION

To my children, Tabo, Mando and Chulu. It broke my heart to leave you, but the journey was worth it.

To my Husband Akabiwa Kalimukwa for his unwavering love, support and encouragement throughout the period of my studies.

To my Mother Enid Mantabe for her unconditional love and support.

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ABBREVIATIONS

AB –Appellate Body

DSB- Dispute Settlement Body

EC0 European Commission

EU- European Union

GATS- General Agreement on Trade in Services

GATT- General Agreement on Tariffs and Trade

WTO-World Trade Organization

CHAPTER ONE

1.0 Introduction

1.1 Background to the Research Problem

In August 2010, the European Union (EU) imposed a prohibition on the importation and marketing of seal products in the EU community.¹ The prohibition on the importation and marketing of seals is composed of two regulations known as the basic regulation² and the implementing regulation³. The basic regulation lays down an almost complete prohibition on the importation and marketing of seal products into the EU. It is an almost complete ban because the basic regulation outlines three exceptions which provide for the placement of seal products on the European market. These exceptions are the Inuit Communities, Marine Resource Management and Travellers' exceptions.⁴

The implementing regulation on the other hand, states in more detail the rules on the implementation of the basic regulation. It lays down specific conditions to be followed when implementing the basic regulation and specifically sets up a mechanism for attesting compliance with the conditions to be met under the three exceptions mentioned in the basic regulation.⁵ The two regulations are collectively referred to as the 'seal regime'.

The prohibition on the importation and marketing of seals came as a result of the public concerns in the EU over the suffering caused to seals during their slaughter. The EU found the commercial slaughter of seals to be morally objectionable and sought to put an end to the trade in seal fur and other seal products by passing a law that prohibited their importation or marketing within the EU. The seals are usually killed using hakapiks, bludgeons, clubs and guns which the EU considers as cruel hunting methods because the seals do not die instantaneously and are

¹The European Union is a political and economic organization located in Europe. It is comprised of 28 member States.

²European Union Regulation 1007/2009/EC adopted on September 16 2009 and entered into force on August 20 2010 (hereinafter referred to) as the basic regulation.

³European Union regulation 737/2010/EU adopted on August 10 2010 and entered into force on 20 August 2010 (hereinafter referred to) as the implementing regulation.

⁴EU (n 1) Article 3 (1) (2) (a) (b).

⁵EU (n 3) Article (3) (4) (5) and (6)

subjected to unnecessary pain, distress and suffering.⁶ The manner of killing of seals has been widely considered as a moral issue in the EU.

There is no precise or a unanimously accepted definition of what constitutes public morals. The New Oxford Advanced Learners Dictionary defines public morals as ‘a system of moral principles followed by a particular group of people.’⁷ In the first WTO case of United States-Measures Affecting the Cross Border Supply of Gambling and Betting Services the Panel considered the public morals exception under the General Agreement on Trade in Services (GATS) where it examined a measure by the US prohibiting certain online gambling services brought before the WTO by Antigua and Barbuda. The Panel stated that:

‘public morals denotes standards of right and wrong conduct maintained by or on behalf of a community or nation. The content of public morals can vary in time and space depending upon a range of factors, including prevailing social, cultural, ethical and religious values... and Members should be given some scope to define and apply for themselves the concept of ‘public morals’ in their respective territories according to their own systems and scales of values’.⁸

The concept of public morals in the above case was recognised and adopted by the Panel in United States-China- Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio Visual Entertainment Products case where the public morals exception was enunciated under the General Agreement on Tariffs and Trade (GATT).⁹ In that case, the Panel and the Appellate Body reiterated and stated that members should be given some scope to define their own public morals’’¹⁰

⁶EU(n 1) preamble (1).

⁷7th ed. 992.

⁸Report of the Panel, United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS285/R para. 6.465, 6.461, available at www.wto.org/english/tratop_e/dispu_e/285r_epdf (accessed 15 December 2013)

⁹United States-China-measures affecting trading rights and distribution services for certain publications and Audio Visual entertainment products, WT/DS363/1 available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (accessed 15 December 2013).

¹⁰ Ibid.

It is important to note that many trade issues are strongly related to social and cultural identities of communities and people. There have been disputes relating to the use of genetically modified Organisms (GMO) in food at the WTO.¹¹ Countries opposed to GMO's in food view

GMOs not only through a strict scientific lens, but also that their view is grounded in their social and cultural perceptions that food should be naturally grown and not modified. It is in this same way that issues to do with animal welfare are viewed by the EU. They are deeply rooted in their cultural and societal values. The EU view animals as “sentient beings”. When something is viewed as sentient it means that it has the ability to have the sense of feeling, taste touch, and therefore if it is an animal killed inhumanely it will feel pain, distress and experience some form of suffering. The EU has expressed moral outrage at the manner of killing, and moral outrage implies that there is an urgent action that needs to be taken to “defend life that cannot defend itself”.¹²

Moral decisions about animal welfare and the responsibility that human beings have towards them are made at different levels within a society. Furthermore, even the choices to purchase products that are made from animals that are killed in an inhumane manner are also made at different levels. The seals case is a case in point. The decision to purchase a particular product largely depends on how that particular product will fit into the consumer's culture, lifestyle, and moral beliefs.¹³ There is no doubt that there is a global trend of the growing influence of personal values in the way consumers purchase their products.¹⁴ They EU feel that the purchase of seal products killed in an inhumane manner is morally wrong and should not be encouraged. Some authors have even stated that “there are may be differing ethical underpinnings for concerns that motivate the protection of animals. For many citizens, moral decisions are based on religious doctrine.”¹⁵ The issues that are raised in the EC seals ban

¹¹European Communities- Measures Concerning Meat and Meat Products (Hormones) WT/DS26/AB/R, WT/DS48/AB/R available at http://www.wto.org/english/tratop_dispu_e/cases_e/ds_e.htm. (accessed 18 December 2013)

¹² MA Gonzales ‘Trade and morality: preserving public morals without sacrificing the global economy’ (2006) 39 *Vanderbilt Journal of Transnational Law* 939-6 available at <http://www.highbeam.com/publications/vanderbilt-journal-of-transnational-law-p5259/may-2006>.

¹³Canada International, Market Analysis Report (2011) ‘Socially conscious consumer trends animal welfare’ October 2011 available at http://www.ats.agri.gc.ca/inter/pdf/5886_eng.pdf. (accessed on 10 December 2013).

¹⁴ Ibid.

¹⁵CC Crooney, ST Millman ‘The ethical and behavioural bases for farm animal legislation’ (2013) *Journal of Animal Science* 556 available at <http://www.journalofanimalscience.org/content/85/2/556>.

aimed at the prevention and mitigation of pain, distress and other forms of suffering in the killing of seals are influenced by the EU community's beliefs and values which in many cases stems from cultural influences and the priority that is given in those cultures to different aspects of animal welfare.

Under the General Agreement on Tariffs and Trade (GATT) and generally under the World Trade Organisation member States are under certain obligations from which they cannot derogate from unless permitted under certain circumstances. Canada and Norway have challenged the EU seal regime on the ground that it is a violation of the EU's obligations under the GATT specifically the Most Favoured obligation contained in Article 1, the National Treatment obligation contained in Article III and the Prohibition on the use of Quantitative Restrictions contained in Article XI. The core GATT obligations are embodied in Articles I, III and IX of the GATT 1994. These obligations entail the equal treatment of trading partners, equal treatment of goods that are traded between the member States and the prohibition on the use of quantitative restrictions.¹⁶ Article I and III are commonly referred to as the non-discrimination principles of the GATT.

However, the EU justifies the seal regime on the ground of EU citizens' moral beliefs on the killing and skinning of seals.¹⁷ The EU seal regime seeks to protect the morals of the EU citizens by removing seal products that may have been derived from seals that were killed in an inhumane manner. The EU seal products ban is not only aimed at improving animal welfare, but it is also based on a level of protection of animals that is grounded in ethical and moral consciousness of the cruelty and level of suffering that seals are subjected to. The ban is an expression of moral outrage at the treatment of animals, and in particular seals. This is on the basis that animals are sentient beings and have the ability to feel pain, distress, fear.¹⁸ These are obviously important interests that may not only be important to the EU but to other WTO members around the world who view animals not only as goods that can easily be traded with but as sentient beings that also have the ability to feel pain and distress. The EU therefore,

¹⁶A quantitative restrictions is considered as a non-tariff barrier (NTB) that restricts the quantity of goods that can enter a country in a particular period.

¹⁷EU (n1) preamble (5).

¹⁸EU (n6)

argues that the seal regime is not protectionist nor discriminatory as it is in pursuance of a legitimate objective which can fall under the ambit of Article XX (a) of the GATT.¹⁹

Article XX provides that member States are at liberty to adopt certain trade measures that are important for the attainment of certain policy objectives that it considers important. The preamble to Article XX states that “Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party measures necessary for the protection not public morals, human, animal or plant life or health...”²⁰ A WTO member is not precluded from adopting measures that it considers vital for the attainment of certain policy goals such as the protection of public morals. However, Article XX further imposes an obligation on members States to ensure that the right to pursue policy objectives such as the protection of public morals is done in a manner that does not prejudice the interests of other members of the WTO. Article XX states that, it has to be done in a manner that is not arbitrary, discriminatory and an unjustifiable restriction on international trade.²¹ The purpose of Article XX is to set a limitation on the extent to which nations may adopt regulatory trade measures that diverge from the core GATT/WTO obligations. The GATT/WTO does not support the abuse of the policy space that has been given under WTO to adopt trade measures that act as “smoke screens” for protectionist measures. Through WTO law members are supposed to discipline their use of trade distorting policy tools such as bans. The EU seal regime may not violate the GATT provided it is done in a non-discriminatory, all-encompassing and non-arbitrary manner of protecting public morals and not as a protectionist tool to protect like domestic products.

Despite the policy space given to protect public morals or any of the objectives contained in Article XX, the interface between trade and other policy objectives may not be as clear cut as they appear on paper because what may be justified by one member State as being morally acceptable may not be deemed to be so by another. Each case is supposed to be assessed on its merits through established WTO law. This paper takes a systematic look at the EUs’ compliance with WTO/GATT obligations and their right to adopt trade measures that seek to protect public morals.

¹⁹EU first written submissions to the Dispute Settlement Panel 2 available at <https://docs.wto.org>.

²⁰GATT Article XX

²¹Preamble GATT Article XX

1.2 Research Objectives

1. The objective of the research is to assess the strength of a potential exception available to the EU under Article XX (a) of the GATT.

1.3 Significance of the Research

This is not the first time that issues to do with animal welfare are being challenged at the WTO dispute settlement system. Animal welfare issues have been at the centre of conflicts from the times of the GATT through to the creation of the WTO. For example, in 1993 a dispute arose when the U.S. adopted a law known as the U.S. Marine Mammal Protection Act which established standards of harvesting tuna using purse seine nets to prevent the unnecessary killing of dolphins.²² This law entailed that if a country exporting to the U.S. did not meet the standards as specified in the law, the tuna would be embargoed. The Panel ruled against the U.S although the panel report was never adopted because under the old GATT regime, a decision could be blocked by a member state that was unhappy with the decision and the U.S. blocked its adoption. This scenario is no longer possible because under the WTO because of the negative consensus principle.²³ Further, in 1997, under the United States Endangered Act of 1973, the U.S. imposed a ban on the importation of certain shrimp and shrimp products that were not caught using turtle excluding devices (TED) in their nets when fishing in areas where there a significant likelihood of encountering sea turtles.²⁴ Although the two cases were brought under Article XX (b) exception, they are still important for the seals case because the main reason the products were banned was because the countries who adopted the bans did not subscribe to the methods used in the hunting which raised concerns in their countries.

Seals have also come under contention before when in 1983 the EU banned products from ‘whitecoats’ and bluebacks’ a species of seals also known as harp and hooded seals respectively that have not yet been weaned as a result of concerns over their conservation status.²⁵ The current seal dispute is therefore important for two reasons. Firstly the study is of

²²World Trade Organisation *Understanding the WTO* (2011) 5ed 69 available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf.

²³GATT Article IX footnote included.

²⁴United States- Import prohibition of certain shrimp and shrimp products, Report of the Appellate Body WT/DS58/AB/R available at http://www.wto.org/English/tratop_e/dispu_e/cases_e/ds58_e.htm. (Accessed 10 January 2014)

²⁵Council Directive 83/129/, OJ 1983 L 91/30 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31983L0129:EN:HTML>

particular importance because the moral exception under GATT is rarely invoked. It will be the third dispute under the GATT specifically to invoke the public morals exception and the second dispute under the WTO.²⁶ So there has not been a lot of adjudication on the exception. Secondly, it is the first time that a dispute panel at the WTO is adjudicating upon a trade measure adopted for the protection of animal welfare by a Member State purely based on moral beliefs and indignation.²⁷

Although the Panel has issued its decision which has been appealed against by Norway and Canada to the Appellate Body of the WTO, the Seals case will nevertheless play important role in WTO jurisprudence in relation to defining the scope of Article XX (a) of the GATT. The Panel has already stated that animal welfare can fall under the ambit of the public morals exception of Article XX (a). The seals case will help in defining the scope of Article XX (a) and will clarify the uncertainty surrounding trade versus animal welfare debate.

In analysing the EU GATT obligations Chapter two discusses the background to the EC seal regime. The Chapter begins by giving a background to animal welfare regulation in the EU. This background informs the history of the current EC seal regime, its objectives, legitimacy and justification. The chapter intends to show that the EC seal regime is as a result of a long history of animal welfare concerns in the EU.

Chapter three analyses the EU seal regime in relation to EU's obligations under the GATT. The chapter establishes whether the EC seal regime fits into the GATT legal tests and Article XX (a) exception. The analysis of this dissertation will be confined to the GATT for two reasons. Firstly, the GATT is the substantive Agreement and embodies the substantive rights and obligations of all WTO members.²⁸ Secondly the dispute has more to do with the protection of public morals under GATT Article XX. The GATT is therefore more relevant to the dispute.

Chapter four will summarise the findings and provide conclusions and recommendations.

²⁶WTO (n9).

²⁷R Howse, J Langille 'Permitting pluralism: the seal products dispute and why the WTO should accept trade restrictions justified by non-instrumental moral values' (2011) *YJIL* 368 available at www.yjil.org/docs/pub/37-2-howse-langille-permitting-pluralism.pdf.

²⁸AH Quereshi, *International Economic Law* (1999) 258

CHAPTER TWO

2.0 History of Animal Welfare Regulation in the EU and the Current Seal Ban

Animal welfare regulation in the EU has a long history and encompasses different animals and species. The current seal ban is just one of the many regulations aimed at preventing unnecessary animal suffering. The areas covered by EU legislation in relation to animal welfare include transport, slaughter, battery hens, veal, calves, pigs, animals used in experimentation, seals, trapping, conservation of wild birds and animals kept in the zoo among others.²⁹

This chapter seeks to provide a background to how animal welfare issues have evolved over the years to the position to which it now occupies. It will also highlight the current seal regime and its exceptions.

2.1 Background

The EU has been one of the forerunners in championing animal welfare protection and has some of the most stringent animal welfare standards in the world.³⁰ It has ‘an extensive body of animal welfare legislation’ and individual member States are encouraged to adopt national laws aimed at improving animal welfare.³¹ Animal welfare in the EU reflects a long standing moral position on the appropriate treatment of animals by human beings which has prompted the EU to adopt a wide array of legislation dealing with animal welfare in many spheres.

To understand the history of animal welfare in the EU it is important to begin the discussion from the formation of the EU. The European Union was established in 1952. In 1958

²⁹European Commission http://ec.europa.eu/food/animal/welfare/index_en.htm.

³⁰PL Fitzgerald, ‘“Morality” may not be enough to justify the EU seal products ban: animal welfare meets international trade law’ (2011) 14 *Journal of international wildlife law & policy* 85-136 88 available at http://bawp.org.au/wp-content/uploads/2012/08/JIWL_P_Vol14_p85_2011_Fitzgerald.pdf. (accessed 15 November 2013)

See also European Parliament Committee in Agriculture and rural Development, Report on Evaluation and Assessment of Animal Welfare Action Plan available at http://100521_0052_2010_en.pdf.

³¹ H Grethe, ‘High Animal Welfare Standards in the EU and International Trade-how to prevent potential “low animal welfare havens”’ (2006) 32 *Food* 315, 317 available at http://www.agrar.hu-berlin/falul_ta_et/departments/claoe/ihe/Veroeff/Grethe_AW_FP_Pub.pdf.

the Treaty of Rome was signed. The Treaty of Rome established the European Community. However, the treaty of Rome did not have any agreement dealing with animal welfare.³²

Between 1952 and 1989 the EU adopted various pieces of legislation encompassing the protection of animals but animal welfare had not yet entered the treaty system. For example, in 1974 the EU passed a directive on the stunning of animals before slaughter. The directive seems to have set the stage for future developments in the realm of animal welfare in the EU. The preamble to the Directive states that:

‘whereas the community should also take action to avoid all forms of cruelty to animals; whereas it appears desirable, as a first step, that this action should consist in laying down conditions such as to avoid all unnecessary suffering on the part of animals when being slaughtered’.³³

The concern of protecting animals from unnecessary and excessive suffering, pain and distress is also reflected in the current EC seal regime banning the sale and marketing of all seal products. Further, the wording of the basic regulation is similar to that of the first Directive adopted by the EU in relation to animal welfare. Both the basic regulation and the directive on the stunning of animals before slaughter refer to the suffering of animals at the time of killing. The preamble to basic regulation provides that

‘whereasto ban all cruel hunting methods which do not guarantee the instantaneous death, without suffering, of the animals, to prohibit the stunning of animals with instruments such as hakapiks, bludgeons and guns, and to promote initiatives aimed at prohibiting trade in seal products’.³⁴

The common thread of the unnecessary suffering that animals are subjected to is still evident even in their regulations today. Over the years, the EU has adopted pieces of legislation aimed at protecting animals used in many different spheres. The 1974 ban was followed by a series of legislation aimed at improving animal welfare in the EU and among the notables is the regulations adopted in relation to harp and hood seals, leghold trap, farm animals, wild animals, animals used in scientific experiments and domestic animals. The ban on harp and hooded seal

³²Eurogroup for animal ‘Animal Welfare in the treaty, Areas of concern’ 2010 122, available at <http://www.eurogroupforanimals.org/files/publications/downloads/EurogroupForAnimals-AreasOfConcern2010.pdf>.

³³Council Directive 74/577/EEC on the stunning of animals before slaughter available at http://ec.europa.eu/food/fs/aw/aw_legislation/slaughter/93-119-ec_en.pdf.

³⁴EU(n1).

was in response to widespread concerns in the EU relating to the annual killing of harp and hooded seal that had not yet been weaned.³⁵ The ban arose as a result of doubts concerning and population status of harp and hooded seals especially as to the effect of non-traditional hunting on the conservation and population of hooded seals. The ban included ‘raw fur skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms of white coat pups or harp seals and of pups of hooded seals’ and applied to all member States whose responsibility was to ensure that no seal products that were subject of the ban enter the EU territory.³⁶ However, the ban on hooded and pup seals did not apply to traditional hunts that were conducted by the Inuit communities.³⁷ The rationale for the Inuit communities’ exception has not changed. The EU argues that indigenous communities should be allowed to continue with their cultural, economic and social life.³⁸ In 1985, the European Commission (EC) extended the pup and hooded seal ban by the passage of Directive 85/444/EEC. The ban was again indefinitely extended in 1989 by the adoption of Directive 89/370/EEC. The indefinite extension was as a result of a number of factors, including concerns regarding the effects of non-traditional hunting on the conservation of harp seals, renewed public pressure on the need to protect the species as well as the potential impact that could be experienced as a result of the non-extension of the ban.³⁹ Canada had requested consultations in 1983 after the ban on harp and hooded seal products. However, the dispute was not pursued further by Canada after successful consultations between the parties.

In another quest to mitigate unnecessary suffering in trapped animals, the EU adopted the leghold trap regulation in 1991 which banned the use of leg hold traps to capture wild animals. It prohibited the importation of goods and products made from animal species that originated from countries that used leg hold traps or other trapping methods which did not meet international standards regulating trapping methods.⁴⁰ The regulation on trapping methods was premised on the notion that the leghold trap is a cruel hunting method. The regulation prohibiting the use of leghold traps is complemented by Commission Decision 98/596/EC which

³⁵Council Directive 83/129/EEC of 29 March 1989 (n above) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31983L0129:EN:HTML>

³⁶Ibid Article 1 (1)

³⁷ EU (n34) Article 3

³⁸EU (n2) Preamble 14.

³⁹http://ec.europa.eu/environnement/biodiversity/animals_welfare/seals/index_en.htm.

⁴⁰EU Decision 98/596/EC

lists all the countries from which specific pelts can be imported.⁴¹ In 1997 the EU entered into an agreement with the major exporters of fur produced from animals hunted by leghold trap such as Canada, Russia on international humane trapping methods.⁴² This was a form of compromise to avoid an impending trade dispute between the EU and the major exporters of fur. It was also a step further in the establishment of humane trapping standards aimed at improving animal welfare of trapped animals. All these efforts illustrate the sensitivity and seriousness with which animal welfare issues are viewed in the EU. Animal welfare in the EU is an area that is covered by a wide range of legislation.

The Table below summarises the key legislative pronouncements relating to animal welfare in the EU.

Table 1: CHRONOLOGY OF ANIMAL WELFARE REGULATION IN THE EU

| YEAR | TYPE OF LEGISLATION | PURPOSE |
|------|--|--|
| 1974 | Directive 74/577/EEC | <ul style="list-style-type: none"> Banned all unnecessary suffering on the part of animals being slaughtered. |
| 1983 | Directive 83/129/EEC | <ul style="list-style-type: none"> Banned the killing of harp and hood seals of less than 12 months |
| 1985 | Directive 85/444/EEC | <ul style="list-style-type: none"> Extended the 1983 ban on harp and hooded seal The commission was to carry out an investigation into the conservation status of harp and hooded seals |
| 1986 | Directive 609/EEC | <ul style="list-style-type: none"> Protect animals used for experimental and other scientific purposes |
| 1989 | Directive 89/370/EEC | <ul style="list-style-type: none"> Replaced Directive 83/129/EEC |
| 1991 | Regulation(EEC) No 3254/91 | <ul style="list-style-type: none"> Banned the use of leghold trapping methods in capturing wild animals Introduction into the EU of pelts and manufactured goods of certain wild animal species originating in countries which catch them by means of leghold trap or trapping methods which do not meet international trapping standards. |
| 1993 | Directive 93/119/EC Directive 1099/2009 | <ul style="list-style-type: none"> Protection of animals at the time of slaughter Lays down minimum conditions for movement, lairaging, restraint, stunning Protection of animal at the time of slaughter Replaced Directive 93/119/EC |

⁴¹Decision (98/596/EC- the decision allows the import of furs from countries that do not use the leghold traps, or from countries where the trapping methods used for the species listed in the Regulation meet internationally agreed humane trapping standards.

⁴² European Commission 'Implementation of Human Trapping Standards in the EU available at http://ec.europa.eu/enviroment/biodiversity/animals_welfare/seals/index_en.htm

| | | |
|------|--|---|
| 1997 | Regulation (EC) No 35/97 Decision 97/602/EC | <ul style="list-style-type: none"> • Laying down provisions on the certification of pelts and goods covered by Regulation (EEC) No 3254/91 • List countries not using leghold trap or trapping methods which do not meet international trapping standards/ |
| 1999 | Directive 1999/22/EC | <ul style="list-style-type: none"> • Protection of fauna, biodiversity conservation • Regulatr the keeping of wild animals in the zoos. |
| 1998 | Decision 98/596/EC | <ul style="list-style-type: none"> • Lists all the countries from which specific pelts can be imported • Protect animals of all species as long as they are kept for production for farming purposes. • Protection of wild fauna through licensing and inspection of zoos. |
| 1998 | Directive 98/58/EC | <ul style="list-style-type: none"> • Provides a general framework for farm animal welfare and applies to all animals including fish reptiles and amphibians kept for food, wool, skin, fur or other farming purposes |
| 1999 | Directive 1999/22/EC | <ul style="list-style-type: none"> • Relating to the keeping of wild animals in zoos |
| 2005 | Regulation (EC) No. 1/2005 | <ul style="list-style-type: none"> • To increase animal welfare by improving the enforcement of animal transport rules in Europe. Applicable to farm animals such as horses, sheep , goats, pigs and poultry. |
| 2007 | Regulation (EC) No. 1523 2007/43/EC | <ul style="list-style-type: none"> • Banned the import and export of cat and dog fur except for educational or taxidermy purposes. • Lay down minimum rules for the protection of chickens kept for meat production |
| | Directive 1007/2009/EC | Banned the import and export of seal and seal products into the EU market |
| 2010 | Directive 2010/63/EU Regulation 737/2010/EC | Protection of animals used for scientific purposes. Strengthen legislation and improve the welfare of animals used in scientific research. Provide guidelines for the implementation of regulation 1007/2009/EC |

Source: European Commission

Note: The EU legislation is composed of regulations, directives, decisions and recommendations. Regulations are binding and are directly applicable in all member States. Most of the EU laws are directives as can be seen from the Table 1. Directives are binding in all member states but only to the extent of the objective. Each member states decides how the it will implement it. Decisions can be addressed to any or all member States, businesses or individual and are binding to the recipients. Recommendations are not binding

2.2 How Animal Welfare Entered the Treaty System

Between 1952 and 1989, animal welfare was primarily concerned with the attainment of the proper functioning of the EU market and common commercial policy. This was done through treaties which, were amended often to suit the changing policies in the EU. At a secondary level animal welfare was aimed at the development of the EU environmental and agricultural policy.⁴³ However, from the beginning of the 1990's animal welfare legislation in the EU began to accommodate new objectives such as those that encompass social interests, economic concerns, public and animal health issues. The protection of animals became so important that it in 1999, EU members agreed to annex a protocol on animal welfare to the Amsterdam Treaty.⁴⁴ This was a very important step in EU efforts aimed at improving animal welfare for two reasons. First, the protocol on animal welfare imposed an obligation on all the member States to have regard for animal welfare in formulating and implementing their national policies in agriculture, transport, internal market and research. Secondly, it was the first time that animals were being recognized as “sentient beings”.⁴⁵ From this time on, animal welfare has become part of the treaty system and because protocols have the same legal status as Articles that are found in a treaty itself. Protocols are regarded as law by virtue of Article 311 of the Amsterdam Treaty which provides that protocols annexed to the Amsterdam treaty are an integral part of the treaty.

2.3 Current Legal Basis for Animal Welfare Motivation in the European Union

The position at present is that the Protocol on Protection and Welfare of Animals was integrated into the Lisbon Treaty as Article 13 which states that:

‘in formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the requirements of animal welfare, while respecting the legislative or administrative provisions and customs of Member States relating in particular to religious rites, cultural traditions and regional heritage’.

Although the protocol on animal welfare did not provide a solid basis for legislation primarily aimed at animal welfare, it nevertheless played an important role in elevating animal welfare

⁴³(n32)

⁴⁴Protocol on protection and welfare of animals –Annex to Amsterdam Treaty available at <http://eur-lex.europa.eu/en/treaties/dat/119997D/htm/11997D.htm/10110010013>

⁴⁵Ibid..

concerns within the EU. The decision making process was also amended to state that new legislation on animal welfare as any other agricultural issue will become part of the co-decision process. This means that both the European Parliament and the European Council need to agree to legislation before it can be adopted.

Thus, animal welfare is an integral part of the EU. The EU has adopted many regulations and directives relating to animal welfare as elaborated above, yet they still feel that animals continue to suffer cruelty worldwide. The EU views the animal welfare problem not as an EU problem but as an issue that affects animals all over the world.⁴⁶ And therefore, the EU argues that due to the global nature of the problem of animal welfare, they need to address the issue outside of the EU so that they can safeguard the gains they have made thus far as a community regarding animal welfare. The Seal ban is therefore just an extension of the earlier legislative measures to protect certain species of seals. The difference is that the earlier seal ban only sought to protect harp and hooded seals of a young age and was in relation to conservation and not the protection of public morals. The current seal ban is a total ban on all seal products and all products derived from seals unless they fall under the three exceptions.

2.4 The Current Seal Ban

As earlier mentioned the EU-Seal ban is comprised of two regulations namely, the basic regulation and the implementing regulation. The basic regulation imposes a general prohibition on the placing of seal products on the European market. The prohibition is subject to three exceptions. First, seal products derived from hunts traditionally conducted by Inuit and other indigenous communities are excluded. Secondly, seal products that are for personal use of travellers or their families are excluded and thirdly, seal products that result from by-products of hunting that is regulated by national law and conducted for the sole purpose of sustainable management of marine resources are also excluded.⁴⁷

The implementing regulation on the other hand lays down the rules for the operation of the basic regulation. It lays down specific conditions in which the Inuit Communities, Marine

⁴⁶Eurogroup for animals (n31) 123 available at

[Http://www.eurogroupforanimals.org/files/publications/downloads/EurogroupAnimals-AreasOfConcern2010.pdf](http://www.eurogroupforanimals.org/files/publications/downloads/EurogroupAnimals-AreasOfConcern2010.pdf)

⁴⁷EU (n2) Article 3 (1) and 3 (2) (b)

Resource Management and Travellers' exceptions are to be implemented. It also sets up a mechanism for attesting compliance with the conditions to be met under the three exceptions.⁴⁸

2.4.1 Inuit and Indigenous Communities Exception

The seal regime allows for the import of seal products that result from traditional hunts by the Inuit's and other indigenous communities. For this exception to be invoked, three conditions will have to be satisfied. These conditions are contained in the implementing regulation. Among the conditions to be met are that the sealing must be conducted by indigenous communities who have a tradition of seal hunting in their community or geographical area, the seals should be partly used, consumed or processed within that community according to their tradition and that the hunts must contribute to the subsistence of the community. These requirements are verified by the use of attesting documents before the products are allowed into the EU market. The basic regulation defines the Inuit as:

‘Indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognized by the Inuit as being members of their people and includes Inupiat, Yupik (Alaska). Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia)’.⁴⁹

The Implementing Regulation further defines ‘other’ indigenous communities as those “in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”⁵⁰ It also stipulates which seal products under the indigenous communities’ requirement are allowed. A product has to come from the countries listed as being inhabited by indigenous communities and if not satisfy the ‘other’ requirements.

⁴⁸EU (n3) Article (7) (8) (9)

⁴⁹EU (n2) Article 2(4)

⁵⁰EU (n3) Article 2(1)

2.4.2 Travellers Exception

This exception permits importation of seal products on the EU market if they are solely for personal use of travellers' and their families. As long as the quantity does not indicate that, they are to be used for commercial purposes. In order to meet the conditions of this exception the seal products must be worn by the traveller or carried in their personal luggage or should be contained in the personal property of a person who is transferring their place of residence to the EU provided that such seal products are accompanied by sufficient documentation to indicate their origin.⁵¹ This exception allows for the use of seal products even for EU citizens as long as they do not sell them in the EU.

2.4.3 Marine Resource Management Exception

Seal products that result from seal hunts that are conducted for marine resources management are allowed into the EU, provided the seal hunts are conducted in conjunction with a 'national or regional natural resources management plan' which uses scientific population models of marine resources and applies ecosystem-based approach⁵². The hunts are not supposed to exceed the total allowable catch specified in the marine resource management and the resulting seal product should be placed on the EU market in a non- systematic way and not for profit making.⁵³

All the three exceptions apply in all member States which have the responsibility of establishing their own penalties for non-adherence to ensure that all the necessary measures are taken for their implementation.⁵⁴

The current ban on seal products is not the first to be adopted in the EU. While the measures subject to the current dispute are relatively new, they are not the first regulations imposed by the EU, or by Member States of the EU, concerning seal products. The current seal ban is a culmination of earlier bans on the killing and importation of skins from harp seals or hooded seals imposed by the EU in 1983.⁵⁵ There are three principle differences between the 1983 seal ban and the current seal ban. Firstly, the 1983 ban focused exclusively on very

⁵¹EU (n3) Article 4.

⁵²An ecosystem based approach is an approach that takes into account all major interactions in the environment and between living and non living organisms

⁵³EU (n3) Article 5 (a) (b) (c)

⁵⁴EU (n2) Article 6;

⁵⁵EU (n35)

young seals known as white coats (harp seals up to two to three weeks of age and bluebacks (hooded seals) up to 16 months of age while the current seal ban does not make any distinction between the age of the seals but applies to all species of seals regardless of age.⁵⁶ Secondly the current seal ban is extraordinarily different from not only the 1983 seal ban but all bans that have ever been passed by the European Union in relation to animal welfare. This is because the current seal ban has a high degree of moral or ethical values embedded in it and as such is incomparable to other measures that have been enacted to address animal welfare interests. The current EC seal ban specifically mentions ethics in the preamble or the text of its provisions.⁵⁷ Thirdly, the 1983 ban was aimed at the conservation of exhaustible natural resources based on article XX (g) of the GATT.

The current seal ban is a response to the increasing discontent in the European Union, lobbying by animal rights activists, advocacy groups on the level of cruelty to which seals are subjected.⁵⁸ Generally, EU citizens and animal welfare organizations expressed indignation and repulsion regarding the trade in seal products killed in an inhumane manner and called for a ban. It is as a result of this public outcry that the Council of Europe and the European Parliament began considering the possibility of instituting a ban on seal products in 2006.⁵⁹

Before the current seal regime was adopted, the European Commission conducted an investigation into the manner in which seals are killed and skinned. The investigation resulted in an examination of animal welfare aspects related to seal hunting by the European Commission. The examination included the studying of hunting practices and regulatory frameworks in Canada, Finland, Greenland, Namibia, Norway, Russia, Sweden the United Kingdom, and Scotland.⁶⁰ Extensive consultations were also conducted with all interested parties and stakeholders, and the European Food Safety Agency (EFSA) conducted a scientific

⁵⁶EU (n2)

⁵⁷EU(n2) preamble 2

⁵⁸International Organizations such as Humane Society, International fund for animal Welfare and many others have championed the cause of animal welfare and played a significant role in the provoking interest among EU communities on the degree of cruelty that the seals were subjected to during the killing process.

⁵⁹Council of Europe Parliamentary Assembly Recommendation 1776 on Seal Hunting 17 November 2006 available at <http://assembly.coe.int/main.asp?link=/documents/adopttext/ta06/erec1776.htm> and the European Parliament Declaration 38/2006 on Banning Seal Products in the European Union OFFICIAL JOURNAL C,306 E, 15/12/2006, available at [http://www.europeparl.europa.eu/sides/getDoc.do?reference=P6_TA\(2006\)03698&language+EN](http://www.europeparl.europa.eu/sides/getDoc.do?reference=P6_TA(2006)03698&language+EN).

⁶⁰Ibid.

animal welfare study and assessment.⁶¹ The purpose of all this was to ascertain the possibility of instituting a ban on seal products. While this was going on at the European level, Belgium and the Netherlands passed their own seal products bans in 2007 as a response to the same concerns that were under consideration. The European Commission proposed in 2008 that the regulations should be harmonized into one set of rules banning the sale and importation of seal products across the entire EU.⁶² The reason for this proposal was principally to prevent the proliferation of different national rules on the same issue and also to act as a deterrent to an impending complaint by Canada at the WTO Dispute Settlement Body (DSB) concerning the national seal bans by Belgium and the Netherlands. The EU's Commission's proposal was approved by the European Parliament and this led to the passage of the basic regulation in 2009 and the implementing regulation in 2010.

In November 2009, soon after the passage of the current seal ban, Canada requested consultations with the EU and was followed by Norway. In 2011, after unsuccessful consultations, both countries submitted requests for the establishment of a panel. Thus, in October 2012, a panel was composed for European Communities – Measures Affecting the Importation of Seal and Seal Products.⁶³

Undoubtedly, the EU seal ban is motivated by a genuine concern for animal welfare and in this case seal welfare. However, despite this good intention and genuine concern, other Members of the WTO have challenged the seal regime as an abrogation of the EU's obligations under the GATT. Specifically the Inuit communities and marine resource management exceptions have been viewed as discriminatory and against the principles of non-discrimination upon which the WTO is established. The seal regime's lawfulness has therefore been challenged by Norway and Canada and will be the subject of discussion in the next chapter.

⁶¹Ibid.

⁶²EU(n19) 17

⁶³European Communities-Certain Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS369/1, G/L/827/G/TBT/D/31 1 October 2007 available at http://www.wto.org/english/traop_e/dispu_e/cases_e/ds369_e.htm.

CHAPTER THREE

3.0 The EU Seal Regime and the WTO/GATT Law Analysis

In response to the EU seal regime, Canada and Norway have objected to the seal ban and have sought legal redress from the Dispute Settlement Body (DSB) of the WTO because they view the seal regime as an abrogation of their rights under the WTO. Canada and Norway have made three claims under the GATT Article 1:1, III:4 and XI:1.

3.1 Legal Claims by Norway and Canada

The first argument advanced by Canada and Norway is that the EU seal regime is inconsistent with Article 1:1 of the GATT which requires that member states treat each other equally.

Secondly, Canada and Norway contend that the EU seal regime is inconsistent with Article III: 4 of the GATT which obliges Member States not to discriminate between like product of member States. Thirdly, Canada and Norway allege that the EC seal regime violates Article XI: 1 of the GATT which prohibits member States from using quantitative restrictions on the importation of goods.

The main contention that Canada and Norway have in relation to the EU seal regime is that the EC seal regime still permits the importation of seal products into the EU market under the Inuit communities, marine resource management exceptions. According to Canada and Norway, the exceptions result in discrimination and the granting of less favourable treatment to imports from Canada and Norway and not Greenland.⁶⁴ Under the two exceptions, the EU continues to permit the importation even though the particular seals may have been killed in an inhumane manner because of the way that the exceptions have been worded. As such the EU has been considered to be violating its principal obligations under the GATT not to discriminate between 'like products on the basis of country of origin.

3.2 Legal response by the EU

The EU on the other hand, argues that the EU seal ban is justified. They argue that the GATT/WTO allows countries to derogate from their obligations under the GATT to pursue other policy objectives such as the protection of public morals and that right is embodied in Article XX of the GATT. Article XX of the GATT provides several exceptions that allow countries to take

⁶⁴Greenland is an autonomous region in the kingdom of Denmark and is a member of the EU.

reasonable measures to protect ‘(a)public morals ...’.⁶⁵ However, while Article XX allows for discriminatory treatment provided the requirements of Article XX are satisfied, it does not allow discrimination where the law authorising discriminatory treatment is applied in a way that is arbitrary or unjustifiable in the circumstances.

The obligations under contention are contained in Article I, III and IX of the GATT 1994. Article I and III are commonly referred to as the non-discrimination provisions of the GATT and form the cornerstone of the GATT.⁶⁶ These obligations entail the equal treatment of trading partners, equal treatment of goods that are traded between the member states and prohibition on the use of quantitative restrictions.⁶⁷ These obligations cannot be derogated from except under permitted circumstances. The permitted circumstances are provided for under GATT Article XX which provides that member States are not precluded from adopting measures that are necessary for the protection of public morals or any other policy objective that a member state considers to be important. However, the freedom to derogate from GATT obligations is not without limit. The GATT also prescribes the manner in which it ought to be done. It has to be done in a non-discriminatory fashion that would not disrupt trade and would not be seen as an “arbitrary” and an “unjustifiable” restriction on trade.⁶⁸

3.3 The Principles of Non-Discrimination in the GATT

The concept of non-discrimination is fundamental in WTO law and policy and runs through all WTO agreements and is the foundation of the WTO.⁶⁹ The importance attached to discrimination in the context of the WTO and in particular the GATT is embodied and highlighted in the preamble to the Agreement establishing the WTO where it is clearly stated that the agreement is directed to the “elimination of discriminatory treatment in international trade”. The main function of the WTO is to provide an institutional framework through which member States can enter into “reciprocal and advantageous arrangements” with each other.⁷⁰ In practice, it entails that, when one member State grants a concession to another member State regardless of

⁶⁵Article XX GATT Article (a) (b).

⁶⁶P Van de Bossche *The law and policy of the World Trade Organization-text, cases and materials* (2005) 370 available at <http://www.academia.edu/463859/Law-and-policy-wto>.

⁶⁷GATT Article I, III, and XI.

⁶⁸GATT Article XX

⁶⁹Van de Bossche (n66) 308

⁷⁰WTO, Agreement establishing the World Trade Organization preamble para.3 available at www.wto.org/english/docs_e/legal_e/04-wto.pdf

whether that country is a member of the WTO or not, the concession will have to be extended to all WTO members.

3.3.1. The Most Favoured Nation Obligation

Article I:1 of the GATT provides that any trade advantage that a member accords to another member State must immediately and unconditionally be granted to all WTO members. Article I prohibits discrimination between member States in relation to “like products” originating from member States or in relation to products that are destined for different member countries.⁷¹ It applies to both importing and exporting members. The purpose of the MFN treatment obligation is to ensure that all WTO members have the same equal opportunity to import and export to any member State of their choice.⁷²

In order for Article 1:1 to be applicable in the present case, the EU seal regime must firstly, be a law or a regulation preventing the importation or exportation of seal products into the EU community. Secondly the EU seal regime must grant an advantage, favour privilege or immunity to a “like product” originating in or destined for any other country. An advantage under Article 1:1 has been said to be “any advantage, favour or privilege” granted to any product. The advantage, favour or privilege can be through a variety of measures such as through internal laws, regulations, tariffs, formalities, rules and requirements affecting the internal sale of goods. For example an “import duty exemption” accorded to Canadian motor vehicles was considered to be an advantage within the meaning of the MFN principle when it was challenged by the EU and Japan.⁷³ In the same vein, Canada and Norway contend that the EC seal regime grants seal products from Greenland an advantage in the form of market access which advantage is not granted to seal products from Norway and Canada. This advantage is specifically through the Inuit communities and MRM exceptions. Canada and Norway claim that almost all seal products originating in the EU satisfy the requirements of the Inuit Communities and MRM exception.⁷⁴ The advantage arises because most of the seal products

⁷¹ GATT Article I:1

⁷² Van de Bossch(n66) 310

⁷³ WTO, Canada-Certain Measures Affecting the Automotive Industry, Report of the Appellate Body of 31 May 2000, WT/DS139/AB/R, WTO/DS142/AB/R, para. 76, 80-81 available at www.wto.org/english/tratop_e/dispu_e/2823d.pdf.

⁷⁴ European Commission, COWI, ‘Study on implementing measures for trade in seal products’ (2010), 28 available at http://ec.europa.eu/environment/biodiversity/animal_welfare/seals/pdf/study_implementing_measures.pdf.

that will qualify under the Inuit communities and marine resource management exceptions will be from Greenland which is in the EU whereas only a small percentage of seal products will originate from Norway and Canada.⁷⁵ In Greenland 90 per cent of the population is Inuit and almost all seals are caught by the Inuit.⁷⁶ Canada exports only about 20-30 per cent of seal products to the EU. It is therefore inevitable that Inuit seal products will comprise the majority of seal products on the EU market. The panel found that through the Inuit communities exception the EU accords seal products from the EU (Greenland) an advantage over seal products from Norway and Canada because the EU seal regime affects the “internal sale”, “offering for sale”, and purchase of seal products within the EU community.⁷⁷ There is no doubt that seal product from Norway and Canada do not have the same market access as products from Greenland and therefore, the panel was therefore correct in their conclusion that there is an advantage being granted to seal products from the EU unlike seal products from Canada and Norway.

The advantage granted to seal product originating from the EU triggers the question whether the same advantage has been granted “immediately and unconditionally” to all like products originating in all other member States. This question brings to the fore two important aspects to the dispute. The first one is the likeness of seal products originating from Greenland (EU) on the one hand and those originating from Canada and Norway on the other. The second question is, if the seal products in question are like are seal products originating from Canada and Norway have they been accorded immediate and unconditional advantage that is granted to seal products originating from the Greenland.

3.3.2 Like Products

The interpretation and assessment of what constitutes “like products” has been at the heart of numerous GATT/WTO dispute settlement reports.⁷⁸ The term “like products” has been

⁷⁵ibid

⁷⁶CB Graber, C Kuprecht, JC Lai (eds) *‘International trade in indigenous cultural heritage: legal and policy issues’* (2012) 485

⁷⁷WTO (n63)Report of the Panel, para. 7.596

⁷⁸C Pitschas, H Schloemann *‘WTO compatibility of the EU seal Regime: why public morality is enough (but may not be necessary)’* Institute of Economic Law Transnational Economic Law Research Centre (TRLC) School of Law, Martin Luther King University Halle-Wittenberg 14

interpreted as a term referring to products that are in a “competitive relationship”.⁷⁹ In order to ascertain the nature and extent of such a competitive relationship, the WTO dispute settlement panels have elaborated on four general criteria.⁸⁰ First, the properties, nature and quality of the products at issue, secondly, end uses of the products, thirdly, consumer’s tastes and habits in respect of the products and fourth, the tariff classification of the products. It was stated by the Appellate Body that “the accordion” of ‘likeness’ stretches and squeezes in different places as different provisions of the WTO Agreement are applied’.⁸¹ Therefore, we can apply the same principles to the GATT to assess the concept of likeness in the context of the current dispute.

The important issue that needs determination is whether seal products originating from Canada and Norway are in a *competitive relationship* with seal products originating from Greenland. Based on the aforementioned criteria, there appears to be no or little identifiable difference between seal products from Canada and Norway and those from Greenland as the seal products do not depend on whether they originate from Canada, Norway or Greenland. As a result, there is an indication of a competitive relationship between seal products originating from Canada and Norway, and seal products originating from Greenland. The more a product is like with another, the higher the likelihood that they will be a competitive relationship. Products which are not like would not be in a competitive relationship because there would be no basis upon which to compete. Therefore the likeness arises because seal products originating from Greenland, Norway and Canada have the same physical characteristics and are used for the same purposes regardless of the manner of hunting. The products subject of the ban whether hunted within or outside the EU include seal products and articles produced from them such as meat, oil, blubber, organs, fur, skins and all products made from skin such as omega 3 capsules garments and many other products.⁸² Therefore, for the purposes of Article 1:1 all seal products whether from Greenland, Norway or Canada are ‘like’ products.

It may however be argued by the EU as it has done, that, the products to be compared are not like products. If we were to take the example of the Inuit communities’ exception, the argument by

⁷⁹WTO European Communities-Measures Affecting Asbestos and Asbestos-containing products, Report of the Appellate Body of 12 March 2001, WT/DS135/AB/R para. 99, 103; see also WTO, Philippines-Taxes on distilled spirits, Report of the Appellate Body of 21 December 2011, WT/DS396/AB/R. WT/DS403/AB/R, para.119

⁸⁰WTO, (n79), para 101

⁸¹WTO Japan – Taxes on Alcoholic Beverages, Report of the Appellate Body of 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, para.21

⁸²EU (n1) recital (3)

the EU is a viable argument because, under the Inuit exception, consumer tastes, habits and preferences suggest that seal products derived from hunts by the Inuit or other indigenous communities as part of their subsistence are different from seal products derived from commercial hunts because firstly, hunts by the Inuit are perceived to be a legitimate traditional subsistence of indigenous people which overrides the concerns over the inhumane killing methods for commercial purposes and secondly, seal products derived from seals that are killed in an inhumane way are not like seal products killed in a humane way.⁸³ Secondly, seal products derived from seals that are killed in an inhumane way are not like seal products killed in a humane way. This distinction is what has come to be known as the product process and product methods (PPMs) debate. Process and production methods refer to the distinctions that are made in relation to goods in international trade on the basis of the process, inputs and technologies used in their production.⁸⁴ The debate has been a long standing one in the WTO and embraces a number of contentious trade issues such as health and safety, resource depletion of renewable and non-renewable resources, environmental pollution, human right issues such as child labour, forced labour and many others.⁸⁵ The debates surrounding PPMs in particular relates to the definition of 'like'. Those in support of PPMs argue that, for example seal products resulting from seal hunts that are conducted in an inhumane manner are not 'like' seal products that result from seal hunts that are conducted in a more humane manner. The distinction is becoming important even for consumers as they are becoming more aware of issues of animal welfare and are making choices on whether to purchase a product based on the manner in which the animals are slaughtered. Thus, when a country adopts a regulatory trade measure that is aimed at promoting animal welfare it is usually concerned with the manner in which the particular animal or animals are being treated or reared and the different impact that the processing and production methods have on animal welfare.⁸⁶ The issue of PPMs is contentious because at the heart of the WTO are rules stipulating that a country must treat all products in the same way, imported products must not be treated no less favourably than like domestic products

⁸³Howse (n27) 44-45

⁸⁴R Read 'Process and production methods and the regulation of international trade (2005) *World Economy* 239-266 239 available www.oas.org/dsd/Tool-kit/Documents/moduleIIIIdoc/Read%20Article%20on%20PPMs.pdf. (accessed on 2014)

⁸⁵ibid

⁸⁶CJ Archibald 'Forbidden by the WTO? Discrimination against a products when its creation causes harm to the environment or animal welfare' (2008) *Natural Resource Journal* Vol. 48 15 available at http://lawlibrary.unm.edu/nrj/48/1/03_archibald_harm.pdf.

and yet it also gives a right to member States to take measures aimed at the protection of public morals which are said could vary in time and space and will largely depend on culture, religion, ethics of country concerned. These are two competing rights which are to be exercised in a manner that does not compromise the reciprocal benefits that each WTO member is entitled to. From a logical point of view, one would think that the process and production methods in the production of a good have nothing to do with the final product that is produced because such processes do not reflect themselves physically in the product. A consumer cannot tell simply by looking at a product and know the process that was used. If such is the case, what is the problem with PPMs? The problem with PPMs is that qualitative criteria for trade regulation are generally inconsistent with Article III which prohibits product based distinctions.⁸⁷ Although restrictions based on PPMs are applicable to domestic producers, they become problematic with respect to imports from third countries because they will be deemed to be incompatible with Article III which prohibits discrimination between ‘like; domestic and imported products. However that is not to say that PPMs are prohibited per se. In the famous Tuna-Dolphin case a US policy which required that tuna products be labelled “dolphin safe” was held to be compatible with WTO law. It was stated that, the labelling was to allow consumers make an informed as to the products that they were purchasing whether it was imported or domestically produced.

The justification for the use of PPM restrictions depends on the sanctioned use of Article XX general exceptions. Finding the right balance is not easy, but the WTO does strike this balance appropriately between trade and public morals through Article XX and we shall see how this is done.

3.3.3 Discriminatory treatment

The Panel found that seal products originating from the EU and seal product originating from Canada and Norway are like for the purposes of the MFN principle and therefore the same market access granted to seal products from Greenland should be granted to Norway and Canada.⁸⁸ This means that, the advantage accorded to seal products from Greenland should immediately and unconditionally be granted to seal products originating from Canada and

⁸⁷Read (n84) 245

⁸⁸WTO (n77) para. 7.600

Norway. The MFN principle prohibits discrimination among like products, irrespective of whether the discrimination appears on the face of the measure (de jure) or implicit (de facto).⁸⁹

In Canada-Auto the Appellate Body stated that:

‘...in approaching this question, we observe first that the words of article 1:1 do not restrict its scope only to cases in which the failure to accord an “advantage” to like products of all Members appears on the face of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words “de jure” nor “de facto” appear in Article 1:1. Nevertheless, we observe that Article 1:1 does not cover only “in law”, or de jure, discrimination. As several GATT panel reports confirmed, Article 1:1 covers also “in fact” or de facto discrimination. Like the Panel, we cannot accept Canada’s argument that Article 1:1 does not apply to measures which, on their face, are “origin-neutral”’.⁹⁰

However, according to some recent WTO cases, discrimination including de facto discrimination has to be based on the country of origin of the goods.⁹¹ The EU seal regime does not discriminate on the basis of the origin of the goods because all countries are at liberty to export to the EU. The question is how can there be discrimination when Canada and Norway have Inuit communities as well. On the face of it, the Inuit exception does not seem to suggest discrimination because it applies to all seal products regardless of where they come from and can thus be said to be origin neutral. However, the devil is always in the detail. To answer this question it is important to consider the volume of imports that are involved. As earlier alluded to, most of the seal products from Greenland will satisfy the Inuit exception while the majority of seal products from Norway and Canada will account for a very small percentage under the Inuit exception.⁹² Consequently, the EU seal regime does not therefore unconditionally and immediately accord to seal products originating from Canada and Norway the same benefit as seal products from Greenland.

Furthermore, when it comes to the marine resource management exception, the implementing regulation clearly states that seal products under this category can only be placed on the market if the hunts are conducted under a national or regional marine resource

⁸⁹WTO, Canada-Certain Measures Affecting the Automotive Industry, Report of the Appellate Body of 31 May 2000, WT/DS139/AB/R, WT/DS142/AB/R, para.78, 84.

⁹⁰Ibid.

⁹¹WTO (n89) paras.10.14-10.50.

⁹²COWI (n74) Canada 28, Norway 64

management and are placed on the market in a non-systematic way and not for commercial purposes.⁹³ This can amount to de facto discrimination because most EU countries use the ecosystem-based approach which meets the criteria envisaged in the MRM exception. Norway and Canada practice marine resource management but on a commercial basis which system is not in the form stipulated by the EC seal regime.

It is noteworthy to state that, the EU seal ban is motivated by moral repulsion at the manner of killing seals yet, they are not prevented from importing these products from outside the EU as long as they are hunted by the Inuit communities or conducted under a marine resource management system. This exception somewhat undermines the efficacy of preventing EU citizens from coming into contact with seals that might have been killed inhumanely. There is an indication of a lack of consistency in the application of the moral principle for the EU. Morality is supposed to be a standard which ought to be applied consistently and without exception because it is a standard of right and wrong. If at all there are exceptions they should be explicit and clear to avoid the likelihood of arbitrariness.

Is there discrimination in terms of Article 1:1

The Panel found that there is discrimination in terms of Article 1:1 on the ground that only a small percentage of goods will qualify under the Inuit and marine resource management exception.⁹⁴ Therefore, the assessment of the panel that the Inuit communities and marine resource management exceptions which clearly grants an advantage to seal products from Greenland and is therefore contrary to Article 1:1 of the GATT was correct contrary to the claim by the EU that it is origin neutral. Article 1:1 clearly states that “any advantage favour or privilege”.

It is noteworthy to state that, the EU seal ban is motivated by moral repulsion at the manner of killing seals yet, they are not prevented from importing these products from outside the EU as long as they are hunted by the Inuit communities or conducted under a marine resource management system. These exception somewhat undermines the efficacy of preventing EU citizens from coming into contact with seals that might have been killed

⁹³Article 5 (a) , (b), (c)

⁹⁴WTO,European Union-Measures Prohibiting the Importation and Marketing of Seal Products, Report of the Panel WT/DS400/R, WT/DS40/R of November 25 2013 para 7.317-7.319.

inhumanely. There is an indication of a lack of consistency in the application of the moral principle for the EU. Morality is supposed to be a standard which ought to be applied consistently and because it is a standard of right and wrong. The standard ought to be applied in a manner that does not expose it to differing interpretations thus making it arbitrary.

3.4 The National treatment obligation

Article III also known as the National Treatment principle obliges member States not to grant their own domestic producers favourable treatment over foreign producers.⁹⁵ The national treatment principle under the GATT implies that once imported goods enter the market of a member State they must be treated in the same manner as domestic products. The basic rule under the national treatment obligation is that no law, regulation, or taxation pattern may adversely modify the conditions of competition between like imported and domestic products in the domestic market.⁹⁶

The most relevant subsection in the National Treatment obligation in relation to the EU seal regime is Article III: 4. Article III: 4 states:

‘the products of the territory of any contracting party imported into the territory of any contracting party shall be accorded treatment no less favourable than that accorded to the *like products* of national origin in respect of all laws, regulations and requirements affecting their internal sale...’⁹⁷

When products are found to be like under Article III, it means that a WTO member cannot regulate, tax, or otherwise impede the internal sale of a foreign differently from how the domestic “like product” is being treated. Therefore, if there is a distinction between products relating to the way in which they are produced, for instance, seal products derived from seals that are killed in an inhumane way and seal products of animals killed in a humane way satisfy the distinction of “like”, nations may not pass laws, regulations or tax the former on their

⁹⁵GATT Article III

⁹⁶Korea- Beef-Measures Affecting Imports of fresh, chilled and frozen Beef WT/DS161/R , WT/DS169/R (31 July 2000) available at http://www.wto.org/english/tratop_e/dispute_e.htm .

⁹⁷ GATT Article III:4

importation.⁹⁸ The importing nation may tax, regulate, label or otherwise as long as the domestic product derived from seals killed inhumanely are similarly taxed, regulated or labelled.

Three elements must be demonstrated in order to establish inconsistency with Article III. Firstly, the measure at issue must constitute a law, regulation or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of the products at issue. Secondly, the imported and domestic products must be “like products” and thirdly, the treatment accorded to the imported product should be “less favourable” than that accorded to like domestic products.⁹⁹

In terms of the EU seal regime being a law or a regulation, the basic and implementing regulation establishing the seal regime apply and are binding on all Member States. The regulations therefore qualify either as a law or a regulation within the meaning of Article III:4. However, the question that is important is whether the seal regime affects the internal sale, offering for sale or purchase, distribution and use of seal products in the EU market. Although the term “affecting” in Article III: 4 can be widely interpreted, it is clear from the wording of the basic regulation that the seal regime “affects the internal sale, offering for sale and purchase” of seal products in the EU community. This is because, the basic regulation prohibits the placing of seal products on the EU market except where one of the three exceptions mentioned above has been complied with. The effect therefore is that, there is limited market access for seal products in the EU from Canada and Norway. Having concluded above that seal products originating from the EU and seal products originating from Canada and Norway are in a competitive relationship, they are “like” products for the purposes of the national treatment obligation.

3.4.1 Is there treatment less favourable?

The determination as to whether there is “less favourable treatment” of seal products imported from Norway and Canada as compared to like domestic products from Greenland is based on two important propositions. Firstly, that the imported and like domestic products are treated differently; secondly, that the difference in treatment between imported and like domestic

⁹⁸L Yavitz (2002) ‘The WTO and the Environment: the Shrimp case that created a new world order’ 16 *Journal Natural Resources & Environmental law* 203–209

⁹⁹WTO, Thailand-Customs and Fiscal Measures on Cigarettes from the Philippines, Report of the Appellate Body of 17 June 2011, WT/DS371/AB/R, para. 127. Available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e371abr_e.pdf.

products leads to a distortion of conditions of competition to the detriment of imported products.¹⁰⁰ The two propositions were dealt with by the Appellate Body when they stated that formal differences between domestic and imported products does not constitute less favourable treatment unless the measure at issue modifies the conditions of competition in the relevant market to the detriment of imported products.¹⁰¹ In a recent case, the Appellate Body stated that:

‘...the mere fact that a member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4. Rather, what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products. If so, the differential treatment will amount to treatment that is ‘less favourable’ within the meaning of Article III:4’.¹⁰²

3.4.2 Meaning of differential treatment

In the analysis of ‘less favourable treatment, seal products imported from Canada and Norway are treated differently from seal products imported from the EU. The basic regulation stipulates that the EU seal regime applies to all seal products. The EU therefore, in its law does not explicitly distinguish between imported and like domestic seal products. On the face of it there is no distinction between seal products imported from Canada and Norway and like seal products originating from Greenland. Differential treatment has to be the way in which foreign products are treated when compared to the domestic products. On the face of it, there is no distinction. However, there is an implicit difference when the volumes of imports are compared under the Inuit communities and marine resource management exception. This difference can justify the difference in treatment between seal products from Greenland and those from Norway and Canada.

Canada and Norway have claimed that there is discrimination of seal products imported from Canada and Norway and the like domestic seal products originating from Greenland. This is because, most of the seal products originating from the EU will benefit from the Inuit exception because 90 per cent of the population in Greenland is Inuit and almost all seals are caught by Inuit.¹⁰³ This is not the same with Canada and Norway and therefore, it will be found

¹⁰⁰WTO, (n96) para.137, 135

¹⁰¹ibid.

¹⁰²WTO,(n99) para. 129

¹⁰³Graber et al (n) CB Graber, C Kuprecht, JC Lai (eds) *‘International trade in indigenous cultural heritage: legal and policy issues’* 485

that only a small proportion of seal products from Canada and Norway will qualify under the Inuit exception.¹⁰⁴ Furthermore, the MRM exception will also not be available for the majority of seal products from Canada and Norway as seals in these countries practice marine resource management on a commercial basis resulting in the granting of less favourable treatment to seal products from Norway and Canada.¹⁰⁵

3.4.3 Distortion of conditions of competition

The second prong in the analysis of ‘less favourable treatment determines whether the differences in the treatment of imported seal products and like domestic products modifies the conditions of competition to the detriment of the seal products imported from Canada or Norway, resulting in EU seal products having a competitive advantage over imported seal products. The EU seal regime modifies the conditions of competition to the detriment of Canadian and Norwegian seal products. The Inuit and MRM exceptions modify the conditions of competition of seal products from Canada and Norway due to the requirements that are supposed to be fulfilled before seal products can be placed on the EU market. The requirement in the Inuit communities’ exception and the Marine resource exception favour Seal products from Greenland.

3.4.4 Is there a breach of Article III :4?

There is a breach of Article III: 4. The Panel was correct when they held that the EU seal regime modifies the conditions of competition to the detriment of seal products from the EU. Seal products from Norway and Canada cannot compete favourably with seal products from Greenland because the seal regime has established conditions under which they can be imported into the EU. Seal products from Greenland have an advantage because most of its population is Inuit and therefore will satisfy the conditions as envisaged by the seal regime and also because it practices an eco-system based marine resource management that is envisaged by the implementing regulation while Norway and Canada are disadvantaged because their marine resource is conducted on a commercial basis.

¹⁰⁴WTO, Request for consultation by Norway 2

¹⁰⁵ ibid

3.5 Prohibition on Quantitative Restrictions

Canada and Norway also allege that the EU Seal Regime violates Article XI:1. Article XI compliments and adds a very powerful provision to Article I and III by eliminating quantitative restrictions on imports within a given period. Article XI governs the use of quantitative restrictions under the GATT regime. A quantitative restriction is a measure which limits the quantity of a product that may be imported or exported into a country.¹⁰⁶ In the WTO regime, tariffs are more preferred than quotas because they are transparent, easier to calculate and less trade distorting.¹⁰⁷ Quantitative restrictions can have a distorting effect on country as they are susceptible to manipulation. Article XI is different from Article I and III: 4 because, it can be breached even where there is no 'like' domestic product at issue. The fundamental question under this Article when breached is whether the adoption of a quantitative restriction falls under the permitted circumstances.¹⁰⁸ The permitted circumstances include restrictions temporarily applied to prevent critical shortages of food or other essential products, restrictions necessary to the application of standards of regulation for classification, grading or marketing of commodities in international trade and import restrictions on any agricultural or fisheries product.¹⁰⁹

It is clear from the above exceptions that the seal regime does not fall under any of the permitted circumstances. It has been stated that a measure cannot fall simultaneously under Article III and XI.¹¹⁰ The panel did not discuss the claims under Article XI:1 of the GATT. What the panel considered was whether the seal ban is a measure affecting the importation of goods within the scope of Article XI or whether it is an internal regulation which affects the importation of goods within the scope of Article III. In EC –Asbestos, the Panel stated that the analysis of where the ban will fall is by determining whether Note Ad Article III of the GATT applies.¹¹¹ Note Ad Article III provides that any internal tax or other internal charge or any law, regulation or requirement which applies to like imported and domestic products and is enforced at the time of importation is to be regarded as an internal tax law, regulation or requirement and

¹⁰⁶Van de Bosche (n66) 441. It covers prohibition or bans, quotas, automatic and non- automatic licensing and other quantitative restrictions such as quantitative restrictions made through state trading operations.

¹⁰⁷P Guzman, JHB Pauwleyn 'WTO condemnation of US Ban on internet Gambling pits free trade against moral values(2004) *American Centre on International Law* 199 available at <http://www.asil.org/insights/2004/11/insight041117.html> (accessed 28 November 2013)

¹⁰⁸S Charnovitz, 'The moral exception in trade policy', 38 *VA. J. INT'L L.* (1998) 689

¹⁰⁹GATT Article XI (2)

¹¹⁰ Van de Bossche (n66) 347.

¹¹¹WTO (n79) para. 8.8

falls under the ambit of Article III.¹¹² Since the seal ban affects both domestic and foreign products, the Panel considered the claim under Article III and rightly so because, regardless of whether there are domestic or imported seal products the seal regime applies at the time of importation and that is the reason why it was considered under Article III.¹¹³

3.6 General Exceptions to the non-discrimination principles: “Public Morals”

The EU claims that the seal ban can be justified under GATT Article XX (a). A breach of the non-discrimination principles of the GATT may be defended by invoking one or more of the exceptions found in Article XX. Article XX can only be invoked when a regulatory trade measure is found to be inconsistent with Article I, III and IX or any other GATT provision. Article XX inclusive of the sections relevant to the seal dispute states that:

‘Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals... if such measures are made effective in conjunction with restrictions on domestic production or consumption...’¹¹⁴

The exception most relevant to this discussion is XX (a) which provides for exceptions “necessary to protect public morals” The main purpose of Article XX is to ensure that non-economic policies of member States do not affect the free flow of goods and services and are not used as a shield of protectionism by member states.¹¹⁵ A member can adopt a measure for the pursuance of certain policy objectives such as the protection of public moral, human, animal, plant life or health even when doing so would violate other GATT provisions, provided that such policy space is not abused.

Article XX (a) is one of the justifications that the EU has invoked to defend the EU Seal Regime. The root of the EU seal regime is the public concern about the methods used in hunting seals, and the pain and suffering that seals are subjected to during slaughter. The methods used in the killing of seals have been viewed as morally objectionable and against the

¹¹² GATT 1994

¹¹³ WTO (n79) para. 8.9

¹¹⁴ Article XX (a)-(g)

¹¹⁵ WTO United States-Import prohibition of shrimp and certain shrimp products WT/DS58/AB/R Appellate Body Report, para. 122-23 available at http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf.

moral consciousness of the EU citizens. The EU seal regime was therefore adopted to protect the public morals of the EU citizens.

In order for a measure to qualify for justification under Article XX, it must satisfy a two-tiered test. The first step requires that a measure satisfies the requirements of one or more of the ten paragraphs (a-j) of Article XX and secondly that the measure satisfies the conditions of the “chapeau” of Article XX.

3.6.1 A measure protecting public morals

Each of the paragraphs in Article XX deal with specific policy goals that countries may wish to pursue. What it means is that, there must be a connection between the measure and the policy goal that is being pursued. In this case, there must be a connection between the animal welfare and the goal of reducing the pain and suffering of seals during slaughter. The determination of whether the measure pursues one of the policy objectives of Article XX is very important. Further, the determination as to whether the animal welfare falls under the scope of public morals exception is also important in this analysis. The basic regulation clearly spells out the rationale for the seal import ban. This was as a result of public concerns raised by the EU community relating to the killing of seals in a way that causes “pain, distress, fear and other forms of suffering”¹¹⁶. Such views on animal welfare are within the purview of individual communities and are not necessarily as a result of international consensus. Further, the EU has numerous pieces of legislation which can show that the protection of seals has been a major point of contention in international trade in the EU.¹¹⁷

In the US-Gambling case the Panel recognized that public morals ‘can vary in time and space depending on a range of factors, including prevailing social, cultural, ethical, and religious values’ because they are standards of right and wrong that belong affect or concern a particular nation or community’.¹¹⁸ The literal interpretation of this is that such morals would be local morals as public morals cannot be exported if the above factors are considered. If a measure cannot be provisionally justified that it protects public morals, then the measure will not satisfy this requirement and there would be no need to go further to the second test. It is clear that the

¹¹⁶(n2) recital (4) and (5)

¹¹⁷EU (n59)

¹¹⁸WTO, (n8) para.6.458.

EU seal ban responds to moral concerns regarding the manner in which seals are killed. They find the treatment of seals inhumane. There is undoubtedly a relationship between protection of seals from unnecessary suffering and the protection of public morals. The EU community view animals as sentient being which ought to be protected. This view forms part of their value system and is part of their culture. Marwell has succinctly stated that:

‘public morals’ could mean anything from religious views on drinking alcohol or eating certain foods to cultural attitudes toward pornography, free expression, human rights, labour norms, women’s rights, or general cultural judgments’ about education or social welfare. What one society defines as public morals may have little relevance for another, at least outside a certain core of religious or cultural traditions.’¹¹⁹

The EC seal regime would therefore fall under the ambit of protecting public morals and would satisfy the first element under Article XX (a). Under the GATT/WTO, a country can define its own public morals.¹²⁰ It is unlikely that the seal regime would not satisfy this because it is clearly evident that the driving force of the EU seal ban is based on morals considerations of the pain and suffering experienced by seals during killing and skinning process. The regulation would thus pass the first prong of falling under the ambit of Article XX (a).

However, the scope of the public morals exception has never really been established. The exceptions that are found in Article XX do not explicitly spell out all the policies that may fall under the exception. What is clear though is the fact that these exceptions exist and nations can adopt measures relying on these exceptions. GATT jurisprudence is also clear as it gives nations the right to adopt trade measures that are necessary for the protection of a member States’ public morals. Article XX (a) which is under contention in the case under discussion is a broad exception and a number of policies can be encompassed. It has been observed, that animal welfare has been held to be a legitimate objective by the Panel. It remains to be seen as to whether the Appellate Body will adopt the same view. It is clear that a member State can take a moral stand that is inconsistent with the international community provided it is no done in an arbitrary, discriminatory manner.

¹¹⁹JC Marwell ‘Trade and morality: the WTO public morals exception after Gambling’ (2006) 81 *New York University Law Review* 802, 815 available at http://www.nyulawreview.org/sites/default/files/pdf/6_2.pdf.

¹²⁰WTO,(n8).

The two cases that dealt with the public morals exception did very little to clarify its scope as there was still a lot of uncertainty even after the adjudication of the two cases as regards what constitutes public morals.¹²¹ It is clear from the existing literature that scholarly opinion and GATT jurisprudence is sharply divided on what constitutes public morality. There are two schools of thought that have taken sides on whether or not to allow regulatory trade measures based on interests that have nothing to do with trade promotion. The first school of thought is that of unilateralists who argue that the WTO has enough policy space to accommodate such interests and who argue that animal welfare are vital concerns that justify governmental intervention in the form of trade regulatory measures in order to safeguard and protect citizens of a country.¹²² They argue that the WTO should recognize moral and ethical reasons as adequate to justify trade restrictive measures because if it does not “it risks imposing a secular materialistic vision of politics on WTO members”.¹²³ Unilateralists argue that each country should be left to define their own moral standards which, do not have to be necessarily the same with other members.¹²⁴ They further contend that the GATT strikes a balance between the rights and obligations of member States through Article XX. They have argued that the fact that that a country chose to be a member of the WTO does not mean that they forfeited their right to determine the level of protection that is required in order to deal with an issue that is of great concern to its citizens and the country at large.¹²⁵

The second school of thought is that of territorialism. Supporters of territorialism argue against allowing governments to unilaterally restrict trade on the basis of non-trade related concerns.¹²⁶ They argue that unilateralism should not be allowed in the WTO because it is a way of forcing other members to adopt trade regulatory policies that are similar to the country that is imposing them¹²⁷. They believe that unilateralism may in the long run undermine the principles of non-discrimination upon which the WTO was established because unilateral actions are inherently

¹²¹WTO (n8) (n9)

¹²²Howse(n24) 427. Howse and Langille have argued for what they have termed as pluralism. According to them “pluralism entails a sensitivity to the varied totality of deeply held beliefs within each society and even within the value system”.

¹²³Howse (n24) 431.

¹²⁴ibid

¹²⁵A Noelkamper ‘*legality of moral crusades disguised in trade law: an analysis of the EC ban on fur from animals taken by leghold traps* (1996) *Journal of Environmental Law* Vol 8 (2) 29 143.

¹²⁶ibid

¹²⁷Ibid.

extra territorial. This effect brings to the fore the question of whether public morals aimed at protecting public morals outside the territorial jurisdiction of the member States taking the action can be justified under Article XX (a)? Should issues of public morality extend beyond the borders of a member states which seeks to protect its citizens from conduct which is against their culture, beliefs, and ethics? The unilateralists argue that regulatory trade measures taken to protect the public morals of a community are justified and should be allowed under the WTO even though they have an extra territorial effect. In the present case one would argue that the morals that are sought to be protected are those of the EU community and not any other. However, even though the morals that are sought to be protected are those of the EU citizens, other members of the WTO cannot export to the EU if their seal products do not fall under the three permitted circumstances and therefore they are forced to adopt the values of the imposing nation even when they do not subscribe to those values. This is the precise reason why the seal regime is being challenged at the WTO.

Supporters of territorialism on the other hand contend that morality should end at the border. They contend that morality should be confined to the individual member States and should not extend to other countries who do not share the same moral beliefs and values such as those relating to how human beings should treat animals.¹²⁸ Those who support territorialism argue that unilateralism will undermine the international application of the rule of law and will in turn increase the number of disputes and will lead countries to begin retaliating against one another.¹²⁹ Supporters of territorialism argue that permitting unilateral import bans would encourage and lead to the violation of the fundamental principles of public international law and would consequently lead to undesirable outcomes and would undermine the multi-lateral organization.¹³⁰ They further argue that unilateralism could lead to the disruption of trade and allow imperialism by countries with market power because countries would advance their own political and protectionist interests in the name of protecting public morals.¹³¹ As a result, unilateralism would destabilize the reciprocal bargains that form the basis of the WTO and

¹²⁸Noelkamper(n 125).

¹²⁹Fitzgerald(n 30) 136.

¹³⁰S Charnovitz 'The moral exception in trade policy' (1998) *Virginia Journal of International Law* 689 23 available at <http://www.worldtradelaw.net/articles/charnovitzmoral.pdf>

¹³¹ ibid

thereby reduce welfare of citizens in member countries by suppressing what would have otherwise been beneficial economic exchange between member states.¹³²

The disadvantage of unilateralism is that if it is left unchecked there is the likelihood of member States abusing it.¹³³ Territorialism would also be confined and thereby limit reciprocal benefits between member States and would not make sense in this day and age of globalisation where norms and values are becoming global. Unilateralism is better because it allows countries to prioritise that which they think is important to them. In the case of public morals for example, it would be very difficult to have a multi-lateral definition of morality let alone what it comprises of. The reason is, the world is diverse with different cultures, religions, beliefs and therefore agreeing to a common understanding of public morality would be a difficult task for not only nations but for the WTO as well. Unilateralism can be efficient especially for those policy objectives where international consensus would be difficult.

What is important is to establish a criterion by which trade measures can be assessed thereby, allowing countries to define their own scope and level of protection. This is precisely the work of Article XX, to balance the interest of the international community as well as the interests of the individual member States.

3.6.2 Requirements of the chapeau

The second step is the consideration as to whether the measure in question satisfies the requirements of the “chapeau” of Article XX. The chapeau states that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade...¹³⁴

The chapeau has different components that need to be met to ensure compliance.

¹³²M Matsushita, M Schoenbaum, TJ Mavroidis *The World Trade Law Organization: Law, Practice and Policy* 2 ed. (2006)

¹³³Noelkamper (n 126) 232.

¹³⁴ GATT Article XX

3.6.2.1 Protecting public morals

According to Article XX the first requirement under the chapeau is that of the measure being necessary to protect public morals. In the case Korea-Beef, the Appellate Body concluded that for a measure to be necessary it must be near being “indispensable” than to “making a contribution to”.¹³⁵ In Brazil- Retreaded, the Appellate Body stated that in determining what is ‘necessary’ it will involve the process of weighing and balancing factors in relation to the importance of the EU seal ban and the significance of the restriction on trade.¹³⁶ The above conditions are not wholesome for every case. Each trade measure will have to be assessed on a case by case basis. There are generally three conditions that are used to assess necessity namely: the importance of the policy objective pursued; the contribution of the measure to the objective pursued and the trade restrictiveness of the measure. There must not be a readily available alternative which would achieve the same level of protection for the chosen policy objective but one which is WTO consistent or less trade restrictive.¹³⁷

Importance of the policy objective

This condition requires that the policy object must be one which is very important to the nation that is restricting trade. Considering the manner in which animal welfare protection has evolved in the EU, there is no doubt that public morals are of highest importance in the EU. In China- Audio- Visual the Panel found that China’s interests were vital and important and stated that “it is up to each member to determine what level of protection is appropriate in a given situation.”¹³⁸ Further when a country accedes to the WTO they do not give up their sovereign right to adopt measures that seek to protect societal values that they consider important. It can be assumed that it is the reason why the drafters of the GATT thought it important to include exceptions that would encompass certain policy objectives such as public morals. This was important because in any case, trade does not operate in a vacuum. It operates within a community and that community has social, economic, cultural, ethical and moral values. It is therefore, inevitable

¹³⁵WTO (n96) para.161.

¹³⁶WTO-Brazil-Measures Affecting Imports of Retreaded Tyres, Report of the Appellate Body of 3 December 2007, WT/DS332/AB/R, para. 182 available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm.

¹³⁷WTO,(n9) para. 7.81.

¹³⁸WTO (n 9)Report of the Panel para. 7.819

that in the course of trade these values are going to intersect. Article XX clearly provides that member States have the right to adopt measures that seek to protect public morals. The seal ban is therefore important for the protection of public morals.

Contribution to the objective pursued

There is no doubt that the EC seal regime makes a material contribution to the objective that is being pursued which is the protection of public morals. The Appellate Body has stated that

‘such a contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue. The selection of a methodology to assess a measure’s contribution is a function of the nature of the risk, the objective pursued, and the level of protection sought’.¹³⁹

Contribution can be established quantitatively or qualitatively. A qualitative contribution can be a difficult adventure in this case because it will be difficult to measure protection of public morals. A way of looking at it would be to determine if there will be a significant drop in the sale of seal products in the EU to those that are going to be imported under the three permitted exceptions. If this scenario leads to reduced consumption which leads to reduced inhumane killing of seals, it will be possible for the EU to argue that there is indeed a material contribution of the measure to the protection of public morals. The EU has argued that the seal products ban is necessary for the protection of public morals but the exceptions do not support that objective. Specifically, the Inuit communities and the marine resource management exceptions undermine this objective because they will still be exposed to seals that may have been killed inhumanely.

However, one may still argue that the seal regime makes a contribution to the protection of public morals. The seal regime may contribute to the protection of public morals because the EU will no longer be exposed to seal products that are derived from inhumane hunts for profit making. However, this position rests on sandy grounds. While it is agreeable that the international community and member States should not force other countries to participate in the purchase of goods that offend the morality of its citizens, it is also difficult to comprehend that there are exceptions in the form of the Inuit communities and the marine resource management exceptions. If indeed the EC is abhorred by the manner in which seals are killed and are also

¹³⁹ WTO (n 141) para. 145.

committed to the reduction of seal hunts globally. The problem is that the Inuit and the marine resource management exceptions are not an m why should there be exceptions which are not carefully limited and clear cut? The failure of the EU to carefully limit the exceptions and make them as explicit as possible exposes the exceptions to differing interpretations which in turn leads to arbitrariness. Through the exceptions especially the Inuit communities and the marine resource management exception, the EU will still be exposed to seal products which are possibly hunted in the same manner as seals that are commercially hunted. This automatically undermines the objectives of the ban. In other words, the ends of the stated objectives of the seal ban are not supported by the means by which the objectives are to be achieved. This can be labelled as arbitrary and discriminatory treatment in international trade by other members of the WTO and a potential use of animal welfare standards for protectionist purposes.

Trade-Restrictiveness of the seal regime

The seal regime is trade restrictive considering the effect that it has on the importation of seal products into the EU. Due to the fact that the exceptions are not explicit and clear cut, the seal regime is trade restrictive. Generally import bans are discouraged under the GATT because they are trade distorting and can have a devastating effect on a country and its people because it leads to a reduction in exports. Bans generally prevent free flow of goods between countries. Canada and Norway can no longer trade freely in seal products unless the seal products satisfy the requirements under the three exceptions. And we have already concluded that 90 per cent of Greenland is composed of Inuit communities, which is not the case for Canada and Norway. It is therefore trade restrictive.

Alternative measures

The important question here is whether the EU could have adopted other reasonably available alternative measures which could have been less trade restrictive than the seal regime. The Appellate Body in US-Gambling noted that an alternative might not qualify as “reasonably available” on two grounds. Firstly, an alternative cannot be reasonably available if it is “merely theoretical in nature”.¹⁴⁰ An alternative is considered theoretical in nature if the responding member is not capable of taking it, or where the measure imposes an undue burden on that

¹⁴⁰WTO (n 9) 304

member.¹⁴¹ Secondly an alternative will be considered “reasonably available” only if it would allow the responding party “to achieve its desired level of protection with respect to the objective pursued...”¹⁴² Among the alternatives that could have been considered is labelling. In this case seal products would be labelled as meeting the standards of the EU market in terms the killing process. However, the preamble to the basic regulation clearly states that labelling is not a viable alternative for the EU because:

‘Labelling requirements would not achieve the same result requiring manufacturers, distributors or retailers to label products that derive wholly or partially from seals would impose a significant burden on those economic operators, and would also be disproportionately costly...’.¹⁴³

What is important is to determine to what extent the alternatives such as labelling are feasible. Practically, labelling will be difficult for obvious reasons. It will be difficult to distinguish between products from ‘inhumanely’ killed seals to those that are ‘humanely’ killed seals. In this case labelling will not be able to achieve the same level of protection as a ban.¹⁴⁴ Another problem would be the cost of adhering to the labelling standards. Such cost can be very high. However, the cost of adhering to the EU standard will not be on the EU but on the member countries who want to export seal products to the EU.¹⁴⁵ All these are reasonably available alternatives which the EU could have considered. The EU cannot justify that the alternatives are not reasonably available to them because the EU community will still continue to be exposed to seal products despite their aversion to the manner in which seals are killed through the Inuit communities and marine resource management exception. This exceptions still allow seal products to come into the EU market and undoubtedly they might have been killed using inhumane methods. In essence the same risk that the EC is trying to avoid will still manifest itself in the Inuit and marine resource management exceptions. In their present form the exceptions will not allow the EU to achieve the desired level of protection because the EC seal regime has no system to distinguish seal products that could have been killed inhumanely.

¹⁴¹Ibid.

¹⁴²Ibid.

¹⁴³(n 2) recital 12

¹⁴⁴EU (n 2) recital 12

¹⁴⁵(n 104)

3.7 The Chapeau

The measure must also satisfy the preamble (chapeau) to Article XX. The Chapeau ensures that countries act in good faith so as to balance the competing rights of members, that is the right to be free to export goods and the right of the other member to limit the importation of goods entering their territories.¹⁴⁶ The chapeau serves to avoid measures from being applied in a manner that would constitute misuse or an abuse of the exceptions of article XX. It seeks to protect the rights of other members in the WTO and also ensure that members exhibit good faith in their trade policy measures.¹⁴⁷ The chapeau requires that a measure does not ‘constitute a means of arbitrary or unjustifiable restriction on trade where the same conditions prevail.’ The fundamental question to be answered under the chapeau is whether the EC seal regime has been applied in a manner that does not constitute an arbitrary and an unjustifiable restriction on trade between countries where the same conditions prevail.” In the Shrimp-Turtle case the Appellate Body stressed the importance of compliance with the chapeau by stating that it is a separate requirement that must be satisfied when relying on an Article XX exception.¹⁴⁸

The first part of the chapeau requires that that measure should not be ‘arbitrary or unjustifiable’. The Appellate Body found that the U.S. had passed a law that regulated foreign gasoline more closely than domestic gasoline with regard to the gasoline content under the Clean Air Act requirements. The Appellate Body found this to be a disguised restriction because it had a flexible standard for domestic producers, while giving foreigners a stricter standard of conformity.¹⁴⁹ There is a thin line between striking a balance by allowing members to pursue non trade related policies despite negative trade effects and preventing them from using these policies in a manner that abuses the basic GATT obligations.

The EU seal regime is arbitrary and an unjustifiable restriction on trade. The Inuit communities and marine resource management exceptions make the seal regime arbitrary and an unjustifiable restriction on trade because of the following factors. First, the seal regime makes no distinction between seals that are killed inhumanely and those that are killed in a more

¹⁴⁶Appellate Body Report Shrimp-Turtle Para(n45) 159.

¹⁴⁷WTO (n141) para.224

¹⁴⁸WTO, United States- Import Prohibition of Certain Shrimp and Shrimp Products, para 156-157.

¹⁴⁹WTO, Appellate Body Report United States- Standards for Reformulated and Conventional Gasoline Report of the Appellate Body 25.

humane manner yet.¹⁵⁰ Yet, all seals and seal related products fall under the seal ban. The current EC seal regime can be distinguished from the leg hold trap regulation which contained a scheme directly targeted at the use of a particular hunting method which was the leg hold trap deemed to be offensive and was banned without exception. By way of contrast, the leg hold trap regulation included a certification process to ensure that the specified animal pelts do not originate from countries where leg hold traps were used or which would otherwise fail to meet ‘international trapping standards’.¹⁵¹ As a result of this process, pelts that were obtained from animals that were killed in a humane manner were not restricted from the EU market. The position above is quite different from the seal ban. The seal ban does not distinguish between seal products killed by hakpiks or firearms from Canada, Norway, Greenland or any other country. This lack of distinction in terms of application shows arbitrariness on the part of the EU. It is this same level of arbitrariness of the application of the measure that made the Appellate Body rule against the United States in the Shrimp Turtle case not because the objective was not legitimate but because it was applied in a manner that was arbitrary and was seen as an unjustifiable restriction on trade.¹⁵²

Secondly, since the ban hinges on the issue of public morals, which the DSB in US-Gambling recognized could vary in time, space and depending on a range of factors such as prevailing social, cultural, ethical and religious values, if it is morally wrong to use hakapiks or clubs in the killing of seals, how can there be a morally acceptable method of killing seals? Animal welfare concerns should be premised on a consistent application of moral principles regardless of the circumstances. If it is indeed animal welfare that the EU is protecting, it should follow that all forms of inhumane treatment and exploitation of animals should be condemned as opposed to focusing on mitigating ‘just’ unnecessary suffering caused to animals. When something is “morally” wrong, there can be no exceptions. I cannot agree more with Francione who stated that ‘the moral exception does not tolerate exceptions’.¹⁵³ Even though morality is not absolute, the standards have to be explicit and clear cut to avoid arbitrariness. The seal

¹⁵⁰S Charnovitz ‘The moral exception in trade policy’ (1998) Virginia journal of international law 739 available at <http://www.worldtradelaw.net/articles/charnovitzmoral.pdf>.

¹⁵¹Fitzgerald(n30) 126

¹⁵²WTO (n 148) Appellate Body Report, para. 185-186

¹⁵³G Francione ‘How true animal rights diverge from animal protection, available at <http://law.newark.rutgers.edu/home/professor-gary-francione-how-true-animal-rights-diverge-animal-protection>. (Accessed 20 December 2013)

regime has limited exceptions but the exceptions are not clear cut. It is easy to observe that there is an advantage that is being accorded to Greenland and this has opened the seal regime to arbitrariness.

Thirdly, if the EU seal regime is truly concerned about animal welfare, why is there concern for seals alone and yet there are animals even within the EU territory which are killed almost in the same manner as seals?¹⁵⁴ Mink for example are gassed to death usually by using carbon monoxide or electrocuted. The welfare of mink and fox are covered in various pieces of legislation such as the directive for the protection of all animals kept for farming purposes, directive on the protection of animals at the time of slaughter. At present Netherlands which is in the EU is the second largest producer of mink with an estimated 5 million mink being gassed to death each year.¹⁵⁵ The EU has banned the sale of seal products from the community market, yet it is still the largest producer of farmed fox and mink and the largest fur marketing company is based in the EU and yet these products are not banned in the EU when cruel hunting methods are used in their slaughter. Is this not arbitrary and an unjustifiable restriction on trade where the same conditions prevail so that the locally produced like products have a more competitive advantage than the 'like' foreign products?

Therefore, as a result of the above mentioned factors, the EU seal regime seems arbitrary in its application. The objectives of animal welfare are compromised by the manner in which it has been applied. On this premise, the EU seal regime would not pass the test as envisaged by the chapeau of Article XX. Although the seal regime can be provisionally justified under Article XX (a), it does not satisfy the conditions of the chapeau, of non -arbitrary and an unjustifiable restriction on trade. Therefore the strength of an Article XX (a) exception is compromised by the manner in which the EC seal regime has been implemented. The

3.8 Animal welfare measures and their legality under the WTO

The WTO is not an organization that directly deals with issues of animal welfare. The only time that the WTO will involve itself in animal welfare issue is when a member States adopts a measure relating to animal welfare and that measure adversely impacts on the free flow of goods

¹⁵⁴MT Tietz 'Fur farming in the European Union' available at http://www.hsi.org/world/europe/work/fur/facts/fur_farming_eu.html.

¹⁵⁵ ibid

among the member States.¹⁵⁶ As such, animal welfare concerns are not an issue of particular focus by the WTO. Thus, there is no WTO agreement that regulates animal welfare. Animal welfare concerns such as those that the EU seal ban raise can only be dealt with under the WTO agreements that generally deal with trade because the WTO/GATT only deal with the trade related aspect of animal welfare.¹⁵⁷

Under the WTO, animal welfare measures can generally be divided into two separate areas namely: animal welfare protection and environmental protection of animals. Animal welfare protection refers to the protection of animals and individual specimen of a species and can encompass the protection of animals against inhumane treatment, whereas environmental protection of animals refers to the protection of the species against extinction.¹⁵⁸ The understanding of what amounts to ‘inhumane’ treatment will not be the same for every individual or community as it differs from one culture to another and also largely depends on the species of animals.¹⁵⁹ For example, Africans do not hold the same view as the Europeans that animals are ‘sentient beings’. Due to the difference in culture and other factors, the level of protection of animals varies from individual to individual and from country to country.

As a result of the lack of common understanding of what constitutes animal welfare, each country has to set its own standard or level of protection. The legal difference between environmental protection of animals and animal welfare protection is that environmental protection of animals has to be based on scientific evidence that a particular species is indeed an endangered species, whereas animal welfare protection is generally a moral decision and will depend on a number of factors such as social, cultural, economic and religious values.¹⁶⁰ Animal welfare measures will most likely be based on morality and will therefore fall under the auspices of Article XX (a). As long as a country can justify a regulatory measure under one of the exceptions under Article XX and also satisfy the conditions of the Chapeau, there is no reason why the DSB will find such measure to be inconsistent with the non-discrimination principles of the GATT.

¹⁵⁶WTO ‘*Understanding the WTO*’ (2011) 5ed 10.

¹⁵⁷Fitzgerald (n 30) 95.

¹⁵⁸ L Nielsen ‘*The WTO and animal welfare: “sufficient nexus” for morally based NPR-PPMS in GATT Article XX*’ European Law Students’ Association (2004) 1 4 available at www.ejil.org/pdfs/20/2/1805.pdf.

¹⁵⁹ibid

¹⁶⁰Nielsen (n 159).

CHAPTER FOUR

4.0 Conclusion and Recommendations

It has been observed that animal welfare concerns can fall within the ambit of public morals. The aim of this thesis was to assess the strength of an Article XX (a). To achieve this goal it was important to highlight and give a background to the current seal regime and how the concept of public morality has been interpreted under the GATT/WTO. Chapter one showed that the issue of public morality is a concept that cannot be defined universally because moral standards are peculiar to a particular nation or community and cannot be held universally. It was observed that in the two cases that have dealt with the concept of public morals under the WTO, they have been inclined to state that each country should be given the space to define its own public morals according to their own value systems.¹⁶¹

Chapter two gave a history of the beginning of animal welfare concerns in the EU. It was shown that the concern for animal welfare in the EU has a long history dating from 1974 and the EU has adopted a wide array of legislation relating to animal welfare. It was observed that before the 1990's animal welfare concerns in the EU were mainly concerned with the harmonisation of internal rules to ensure the proper functioning of the EU market and was limited to agricultural policies. It was only later in the 1990's that the focus began to change to include other concerns relating to social interests such as public morality, food security, environmental protection and sustainability¹⁶². It is during this same period that these concerns began to take centre stage in the EU legislation. The Chapter showed that animal welfare is an integral part of the EU to an extent that it has been integrated into the Lisbon treaty which is the treaty that established the European Union and forms the constitutional basis of the EU.

Chapter three provides a theoretical and analytical perspective of the EC seal regime in relation to the GATT obligations alleged to have been breached by the EU. The Chapter discussed the core GATT obligations of equal treatment of trading partners, equal treatment of like products of goods traded between member States and the prohibition on the use of quantitative restrictions.

¹⁶¹WTO (n 8)

¹⁶²A Gavinelli, N Lakestani 2010 '*Animal welfare in Europe*' available at <http://www.derechaanimal.com/info>.

In relation to Article 1 it was established that although the seal regime does not distinguish between seal products from Greenland, Norway and Canada as the seal regime applies to all seal products irrespective of their origin, there is still discrimination because of the Inuit communities and marine resource management exceptions. It was observed that most of the seal products that will qualify under the Inuit communities and marine resource management exception will be predominantly originate from Greenland.

In relation to Article III:4 it was found that there is a breach because the EC seal regime modifies the conditions of competition of seal products thereby disadvantaging seal products from Norway and Canada. The conditions of competition are modified because seal products from Canada and Norway conducted by the Inuit communities are not only for subsistence, but for commercial purposes as well and the Inuit communities are not as large as in Greenland. Canada and Norway have the largest sealing industries in the world and export a considerable amount of seal products to the EU.¹⁶³ The seal regime therefore goes to the core of their commercial activities and is a major driving force in their economies.

The chapter also discussed the prohibition on quantitative restrictions and found that the Article XI:1 did not apply to the seals case because of Note AD Article III of the GATT. It was however established that in the circumstances in which quantitative restrictions are permitted, they are subject to scrutiny under Article XX of the GATT.

GATT Article XX was found to be the balancing provision between the right to legislate and the right to abide by the obligations that are imposed on member States. It was concluded that Article XX (a) can be invoked to justify the seal ban and that Article XX does not only allow Member States to diverge from their core GATT obligations in order to protect public morals or any of the objectives stipulated in Article XX, it further goes on to state the manner in which the diversion ought to be done. Although the aim of the GATT/WTO is the liberalisation of trade and the elimination of trade barriers, these aims are not an end in themselves, they are limited by public policy considerations that are different and unique from one member state to another. Therefore resolving such policy considerations involves the balancing the rights of each member state to adopt certain policy objectives and their obligations under the GATT/WTO.

¹⁶³ Howse (n 27) 367

The GATT Article XX plays a critical role in ensuring that these competing rights are regulated. The General exceptions clause distinguishes between a genuine concern for regulation and protectionist measures drafted in a policy objective such as the protection of public morals. As long as a member can demonstrate that the particular action justifies regulation under the public morals exception and the conditions of the chapeau are satisfied, the content of public morals can be as wide as the ocean because it can be comprised of anything that is considered to be a public moral issue by a particular nation.

It was observed further that, the EC seal ban is not so much about why the seal ban has been adopted, but how it has been designed and implemented. It has been designed in a way that reduces the efficacy of the objectives that are intended to be pursued. The seal regime as has been stated has not been applied in a fair handed manner. It is discriminatory, arbitrary and an unjustifiable restriction on trade.

Although the aim of the GATT/WTO is the liberalisation of trade and the elimination of trade barriers, these aims are not an end in themselves, they are limited by public policy considerations that are different and unique from one member state to another. Therefore resolving such policy considerations involves the balancing the rights of each member state to adopt certain policy objectives and their obligations under the GATT/WTO.

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This thesis has found that the EC seal ban cannot be justified under Article XX (a) because although it can be provisionally justified that it falls under the ambit of Article XX (a) it has been applied in a manner that is inconsistent with the Chapeau of Article XX. It is plausible therefore, that the Appellate Body will come to the same conclusion, notably that the seal regime has been applied in a manner that constitutes an arbitrary and an unjustifiable restriction on trade.

The seals case presented an interesting case to the WTO as it dealt with the question of morality exception under the WTO an exception that is rarely invoked. The EU has definitely sent the message loud and clear that they preserve the ability to legislate on matters that they consider important to their community where it is necessary. Canada on the other hand might view the Panel decision as an assault on their sovereignty.

Before the Panel handed down its report, animal welfare advocates had raised concerns that if international trade prevailed over the protection of public morals as expressed in the EU seal ban, the effect would be to undermine States' sovereignty to adopt regulatory trade policies that seek to protect the public morals of a country.¹⁶⁴ Furthermore, it is hoped that, the adoption of regulatory trade policies that aim at the protection of public morals would prevail, as this would not only be important for animal welfare based restrictions but all morally based bans as well.¹⁶⁵ However, for free traders the panel ruling is a challenge against the principles upon which the WTO was founded, which is the promotion of free trade. Despite these opposing views and opinions, it is clear from the Panel Report that the WTO/GATT rules explicitly support the adoption and maintenance of trade barriers aimed at protecting public morals on condition that they do not arbitrarily discriminate.

Recommendations

Firstly, assuming that the Appellate Body will conquer with the Panel and find that the EC seal regime is incompatible with the GATT non-discrimination principles, the EU can modify its seal regulation to be flexible and less discriminatory. The Inuit and the MRM should be made compatible with the principles of the trading regime. . The less adverse impact a trade regulatory measure has on international trade the more likely that it will satisfy the condition is the Chapeau under Article XX. GATT jurisprudence has examples of regulatory measures that were found to be arbitrary and unjustifiable restriction on trade and were later modified to make them less trade restrictive.¹⁶⁶ The EC should therefore modify their exceptions to make them more compatible with WTO rules.

¹⁶⁴Howse (n 27)

¹⁶⁵ibid

¹⁶⁶(n 148)

Secondly, the EU should engage other States so see if they can enter into bi-lateral or multi-lateral agreements relating the slaughter of seals. The unilateral action by the EU cannot impose preferential trade systems upon other States. Furthermore indigenous communities should be members so that their interest can also be recognised in international trade but without prejudicing the interests of other member States who do not hold the same view as they do.¹⁶⁷ For example in 1997 the EU entered into an agreement on international humane trapping methods with major exporters of produced from animals that are hunted by leghold trap such as Canada and Russia. The same can be done for the EU seal product,

Thirdly, the EU can develop a certification process that can be used to distinguish between seals hunted by Inuit communities and those conducted under eco-system marine resource management. For example Muslim countries have halal certification for food products. The same idea can be used so that consumers can make a choice of products and how that product fits into their lifestyle.

The question is, how does the EU provide for such circumstances without destroying the efficacy of its objectives. The scope of the exceptions must be carefully limited and clear cut because if they are not they will be exposed to differing interpretations making the likelihood of uniformity arbitrariness, unjustifiable restriction on trade highly likely.

4.1 Future Considerations

The WTO should consider a universal understanding of what constitutes public morality so as to avoid unilateral actions by members. The possibility of abuse in unilateralism is very high. Generally people and nations feel bound if there is an international agreement relating to a particular issue to which they subscribe to than allowing other nations to unilaterally impose their standards on them some of which they may not even subscribe to.

In conclusion, through GATT law, the thesis has adequately analysed the EU seals regime's justification under Article XX (a) of the GATT. Furthermore, the thesis has shown that although the seal regime can be provisionally justified under Article XX (a) it cannot satisfy

¹⁶⁷CB Graber, C Kuprecht, JC Lai (eds) *'International trade in indigenous cultural heritage: legal and policy issues'* 486.

the conditions of the chapeau which require that trade measures be applied in a manner that is non- arbitrary, non-discriminatory and an unjustifiable restriction on international trade.

In conclusion, the ball is in the court of the EU to ensure that the EU seal regime conforms to the requirements of GATT Article XX GATT. This will ensure that a balance is achieved between their right to adopt policies that protect public morals and the right of other WTO members.

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